Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

ORIGINAL



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| In the Matter of | ) | EB Docket No. 03-96 |
| | ) | |
| NOS COMMUNICATIONS, INC., | ) | File No. EB-02-TC-119 |
| AFFINITY NETWORK INCORPORATED and | ) | |
| NOSVA LIMITED PARTNERSHIP | ) | NAL/Acct. No. 20033217003 |
| | ) | |
| Order to Show Cause and Notice | ) | FRN: 0004942538 |
| of Opportunity for Hearing | ) | |

To: The Commission

**MOTION TO STRIKE**

NOS Communications, Inc. ("NOS"), by its attorneys, hereby requests the Commission to strike footnote 4 of the Enforcement Bureau's Reply to Opposition to Motion to Strike ("Reply") filed in the above-captioned proceeding. In support thereof, the following is respectfully submitted:

BACKGROUND

On May 7, 2003, NOS, Affinity Network Incorporated ("ANI") and NOSVA Limited Partnership ("NOSVA") jointly filed a petition for reconsideration of the Commission's *Order to Show Cause and Notice of Opportunity for Hearing* ("*Order*") in this proceeding. The petition was prepared by counsel for NOS and reviewed and approved by counsel for ANI and NOSVA. To expedite the filing of the petition, undersigned counsel was authorized to sign the pleading on behalf of counsel for ANI and NOSVA. *See* Pet. for Recon. at 12 (May 7, 2003).

Undersigned counsel instructed his secretary to mail a copy of the petition to counsel for ANI and NOSVA, and she mistakenly added his name to the certificate of service. Copies of the petition were hand-delivered to the Bureau, as noted on the certificate of service.

On May 7, 2003, the Bureau responded to the petition for reconsideration of the *Order* by

filing a pleading that was both a motion to strike and an opposition to the petition. *See* Bureau's Mot. to Strike and Opp'n to Pet. for Recon. (May 7, 2003) ("Mot. & Opp'n"). NOS, ANI and NOSVA (collectively the "Companies") responded in-kind. *See* Opp'n to Mot. to Strike and Reply to Opp'n to Pet. for Recon. (May 30, 2003) ("Opp'n & Reply").

In the portion of their pleading designated as their reply to the Bureau's opposition, the Companies disputed the Bureau's claim that its opposition had been timely-filed. *See id.* at 4. Because their petition for reconsideration was served on the Bureau by hand on May 7, 2003, the Companies showed that the Bureau's opposition was due on May 29, 2003, but late-filed the day after the deadline. *See id.*

The Companies subsequently agreed to the Bureau's request that they consent to a ten-day extension of the Bureau's five-day deadline under § 1.45(c) of the Commission's Rules ("Rules") for replying to their opposition to its motion to strike. The Bureau filed a motion for that extension of the § 1.45(c) deadline on June 6, 2003.

Having obtained the Companies' consent to an extension of time to reply to their opposition to its motion to strike, the Bureau took the opportunity to respond to the Companies' reply to its opposition to their petition for reconsideration. The Bureau argued, "The Companies claim at page four of their Opposition that the Bureau's Motion was late-filed is without merit." Reply at 2 n.4. Obviously, the Companies never claimed the Bureau's *motion* was untimely. What they actually argued was under the rubric "The Bureau's Opposition Was Late-Filed." Opp'n & Reply at 4.

## DISCUSSION

NOS brings this matter to the Commission reluctantly. The Bureau's refusal to limit its

arguments to matters raised by the Companies in their opposition to the motion to strike appears at first blush to be a run-of-the-mill violation of § 1.45(c) of the Rules. *See* 47 C.F.R. § 1.45(c) (replies "shall be limited to matters raised in the oppositions"). It is the manner by which the Bureau violated the rule, and the substance of its justification, that elevates the seriousness of the matter.

It ill behooves the Bureau to violate § 1.45(c) of the Rules in this case where it is insisting on the strict enforcement of the Commission's procedural rules, and when it has directed somewhat strident procedural arguments at the Companies. *See* Mot. & Opp'n at 4 ("the Companies have concocted their 'adverse ruling' argument as a means by which to improperly and prematurely appeal the [*Order*] to the Commission to evade responsibility for their apparent misconduct") & 5 (the Companies should not be allowed "to bootstrap substantive claims . . . by their disingenuous and meritless 'adverse ruling' argument"). After making such arguments, the Bureau itself should have strictly adhered to the procedural limitation imposed by § 1.45(c) by confining its Reply to matters raised by the Companies in opposition to its motion to strike. That was especially so after the Bureau obtained the Companies' consent to a rather generous extension of the five-day deadline imposed by § 1.45(c).

In a case where it is prosecuting the Companies for engaging in a campaign to mislead, the Bureau should not have been heard to misstate the Companies' argument. The Bureau represented that the Companies' claim at page 4 of their "opposition" was that the Bureau's "motion" was late-filed, *see* Reply at 2 n.4, when in fact the Companies clearly claimed at page 4 of their "reply" that the Bureau's "opposition" was late-filed. *See* Opp'n & Reply at 4.

The Bureau simply could not have misunderstood the Companies' plain language. Seeing

that there is no deadline for filing a motion to strike, there were no grounds on which the Companies could claim that the Bureau's "motion" was late-filed. In contrast, the Bureau was under a ten-day deadline to file an "opposition" to the Companies' petition for reconsideration. *See* 47 C.F.R. § 1.106(g). The Bureau clearly knew it was subject to the § 1.106(g) deadline since it claimed its opposition was "timely filed" under that rule section. *See* Mot. & Opp'n at 1 n.2.

It appears that the Bureau mischaracterized the Companies' claim so it would appear to be "replying" to an argument made in an "opposition" to a motion to strike as permitted by § 1.45(c). NOS would not have complained, however, if that misstatement was the Bureau's only misstep. But to sustain the appearance that it was replying to an opposition, the Bureau went on to claim:

> According to the Certificate of Service appended to the Petition for Reconsideration to which the Bureau's *Motion* responded, the Companies served the pleading via mail on at least one party to the proceeding. Consequently, *all* parties including the Bureau, were entitled to avail themselves of the additional time allowed for pleadings filed by mail for interposing their respective responses. *See* 47 C.F.R. § 1.4(h).[1/]

According to its certificate of service, the petition was only mailed to counsel for ANI and NOSVA. Obviously, because ANI and NOSVA were two of the three parties that jointly filed the petition for reconsideration, and since the petition was signed on behalf their counsel, the mailing of a copy of the petition to counsel for ANI and NOSVA hardly constituted "service" within the meaning of § 1.4(h) of the Rules. That provision only applies "[i]f a document is required to be served *upon other parties* by statute or Commission regulation." 47 C.F.R. § 1.4(h) (emphasis added). There was no requirement that ANI and NOSVA serve their own petition on their own

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[1/] Reply at 2 n.4 (emphasis added).

counsel (who had already reviewed and approved the petition).[2/]

The Bureau only dug itself deeper in the hole when it tried to show that it met the § 1.106(g) deadline:

> The stated purpose of the amendment [to § 1.4(h)] was to avoid the "possibility that some parties in multi-party litigation may be required to file their pleadings before others, giving others an opportunity to 'preview' their arguments before filing their own pleading." . . . In light of the fact that the party that received the Petition by mail is counsel of record in the subject hearing for both the principals of the Companies and for two of the Companies themselves, the potential for abuse, had the Bureau filed its response to the Petition on the earlier deadline advocated by the Companies in the *Opposition*, is self evident.[3/]

The Commission will note, first, that the Bureau represents that the Companies advocated an "earlier deadline" in their *opposition*, when they advocated the May 19, 2003 deadline in their *reply*. *See* Opp'n & Reply at 4. What is disturbing is that the Bureau is actually claiming there was a "potential for abuse" that was "self evident" had it filed its "response" by the May 19, 2003 deadline. Thus, even after having twelve days to reflect on the matter, the Bureau suggested that counsel could have filed an opposition on behalf of ANI and NOSVA to *their own petition for reconsideration* that he helped to write. That suggestion borders on the preposterous.

In cases where a party makes arguments in a reply pleading that are "not limited to matters raised in the opposition," the Commission considers the pleading only to the extent that it is

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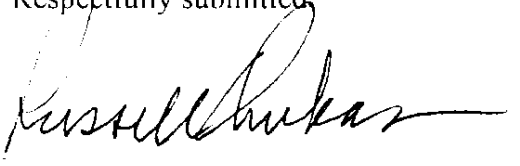
[2/] The Commission will note that the certificate of service for the Companies' Opp'n & Reply does not show that it was served on counsel for ANI and NOSVA.

[3/] Reply at 2 n.4 (quoting *Amendment of § 1.4 of the Rules Relating to Computation of Time*, 11 FCC Rcd 3059, 3059 (1996)) (emphasis added).

responsive to the opposition. *Cellexis Internat'l, Inc. v. Bell Atlantic NYNEX Mobile, Inc.*, 13 FCC Rcd 22461, 22461 n.2 (1998). The Commission should do the same here by disregarding footnote 4 of the Reply. However, should it choose to address the substance of the footnote, the Commission should also consider the substantive arguments made here.

In view of the foregoing, NOS respectfully requests the Commission to strike or disregard footnote 4 of the Reply or, in the alternative, consider the substantive arguments set forth herein.

Respectfully submitted,



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*Counsel for NOS Communications, Inc.*

June 23, 2003

## CERTIFICATE OF SERVICE

I, Linda Evans, do hereby certify that on this 23rd day of June, 2003, a copy of the foregoing "Motion to Strike" was sent by first-class U.S. mail to the following:

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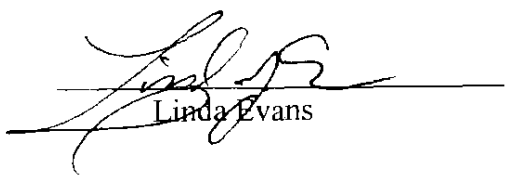


* Via facsimile.